No. 2560

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA DIGGER COMPANY,
a Corporation,
Plaintiff in Error,

vs.

M. R. SPARKS and
C. A. BLUROCK,
Defendants in Error.

WRIT OF ERROR

To the District Court of the United States for the District of Washington.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The plaintiff in error was the plaintiff in the court below, and therefore in this brief the parties will be designated as plaintiff and defendants.

By this writ of error the plaintiff seeks to review a judgment in favor of the defendants rendered by the District Court for the State of Washington in an action at law. The case was tried be-

fore the court without a jury, the parties having in conformity with the statute made and filed a written stipulation waiving a jury trial. Transcript, pp. 21-22-27.

The court made its findings of fact and conclusions of law and upon the basis thereof rendered final judgment in favor of the defendants dismissing the action. Transcript, p. 27.

The action is upon a bond given by Rector and Daly, contractors, and these defendants, as sureties under the Washington statute. Rector and Daly on the 6th of May, 1911, entered into a contract with the City of Vancouver, Washington, for the improvement of East B Street in such city. The bond sued upon was given in compliance with the Washington statute for the security of such persons as should furnish labor and materials to the contractors in the making of such street improvements. Secs. 1159 to 1161, Rem. & Bal. Code of Wash. The contract and bond are attached to the complaint as exhibits and their execution is admitted. The plaintiff's cause of action upon this bond rests upon the fact that it furnished to Rector and Daly crushed rock which was used by them in the making of such improvement. The amount of the rock furnished, its value, and the contract price therefor

are undisputed. And it is admitted by defendants that plaintiff is entitled to recover the sum of $6189.88, unless certain payments by Rector and Daly to the plaintiff are to be applied in extinguishment of such debt.

We call the court's attention to the very important fact that the defendants do not claim in their answer that these payments were made by Rector and Daly to be applied upon such indebtedness, or that the plaintiff ever in fact applied them upon such indebtedness. On the contrary defendants' answer negatives the fact of payment and places the defense squarely on the ground that plaintiff in fraud of the rights of defendants as sureties applied such moneys upon other indebtedness and should be required by the court to change such application of payments and apply the moneys upon the claim for crushed rock. The answer alleges that such money was applied by the plaintiff to the general indebtedness of the said Rector and Daly to the plaintiff and not on account of the material furnished for the improvement of East B Street. Transcript, pp. 19, 20.

Furthermore, the findings of fact and conclusions of law prepared by defendants' attorneys places the decision of the court squarely upon the

ground, not that the payments had in fact been applied upon the account for crushed rock, but that they should be so applied. The first conclusions of law is as follows:

> "That the money received by plaintiff from the City of Vancouver on account of the improvement of said East B Street and paid to the plaintiff through the Vancouver Trust & Savings Bank, **should be applied** in payment for the material furnished by plaintiff and used in the improvement." Transcript, p. 26.

Furthermore, the undisputed evidence shows that the payments referred to were applied by plaintiff upon an account against Rector and Daly for sand and gravel furnished by the plaintiff to Rector and Daly during the same time that the crushed rock was being furnished. The evidence shows that it was a part of the original understanding. between plaintiff and Rector and Daly that the sand and gravel should be paid for in cash as it was furnished from time to time, but that with respect to the crushed rock, plaintiff should wait until Rector and Daly got their money from East B Street. Transcript, pp. 30, 35, 87, 89, 90, 37.

It is not claimed by the defendants that they had any legal or equitable title to the moneys with

which Rector and Daly made the payments in question. It is undisputed that the moneys used by them in making these payments were their own moneys. The sole ground on which the sureties claim that the payments applied upon the sand and gravel account should be applied upon the account for crushed rock is that they had an **equity** as sureties in having the moneys so applied; and they base their contention that they have such an equity upon the claim that the moneys used in making such payments were moneys received by Rector and Daly on account of their contract for the improvement of East B Street. After the case had been tried and before its final decision, plaintiff requested the court to make certain findings of fact and conclusions of law. The court made the first requested finding but refused to make any of the other requested findings, and to each of its refusals an exception was duly allowed. The plaintiff's proposed findings, numbers IV to XXXIII, both inclusive, relate to the payments in question, such payments having been made by checks of Rector and Daly in favor of the plaintiff upon the Vancouver Trust & Savings Bank. There are six of these payments represented by six checks. With respect to each of these payments plaintiff re-

quested the court to find that they were applied upon the account for sand and gravel, and that they were paid out of the general checking account of Rector and Daly in such bank, and in substance that the moneys out of which these checks were paid were not moneys received by Rector and Daly under their contract relating to the improvement of East B Street, and that plaintiff had no knowledge that such payments came from such source. Transcript, pp. 185 to 194.

The proposed findings, XXXIV to XXXIX, both inclusive, requested the court to find that there was no competent evidence that the payments were made out of the moneys received on account of the contract for the improvement of East B Street. The court was also asked to make certain conclusions of law which speak for themselves. Transcript, pp. 194 to 198.

SPECIFICATION OF ERRORS.

I.

The court erred in denying plaintiff's motion to strike out as follows:

"I move to strike out all of that testimony in regard to the application—the testimony given with regard to the security for these notes and the ap-

plication of the moneys, derived from different sources for the payment of these notes, because the testimony is hearsay, and he is not able to testify of his own knowledge of any particular item, except what he was told."

II.

The court erred in refusing to make plaintiff's second proposed finding of fact.

III.

The court erred in refusing to make plaintiff's third proposed finding of fact.

IV.

The court erred in refusing to make plaintiff's fourth proposed finding of fact.

V.

The court erred in refusing to make plaintiff's fifth proposed finding of fact.

VI.

The court erred in refusing to make plaintiff's sixth proposed finding of fact.

VII.

The court erred in refusing to make plaintiff's

seventh proposed finding of fact.

VIII.

The court erred in refusing to make plaintiff's eighth proposed finding of fact.

IX.

The court erred in refusing to make plaintiff's ninth proposed finding of fact.

X.

The court erred in refusing to make plaintiff's tenth proposed finding of fact.

XI.

The court erred in refusing to make plaintiff's eleventh proposed finding of fact.

XII.

The court erred in refusing to make plaintiff's twelfth proposed finding of fact.

XIII.

The court erred in refusing to make plaintiff's thirteenth proposed finding of fact.

XIV.

The court erred in refusing to make plaintiff's fourteenth proposed finding of fact.

XV.

The court erred in refusing to make plaintiff's fifteenth proposed finding of fact.

XVI.

The court erred in refusing to make plaintiff's sixteenth proposed finding of fact.

XVII.

The court erred in refusing to make plaintiff's seventeenth proposed finding of fact.

XVIII.

The court erred in refusing to make plaintiff's eighteenth proposed finding of fact.

XIX.

The court erred in refusing to make plaintiff's nineteenth proposed finding of fact.

XX.

The court erred in refusing to make plaintiff's twentieth proposed finding of fact.

XXI.

The court erred in refusing to make plaintiff's twenty-first proposed finding of fact.

XXII.

The court erred in refusing to make plaintiff's twenty-second proposed finding of fact.

XXIII.

The court erred in refusing to make plaintiff's twenty-third proposed finding of fact.

XIV.

The court erred in refusing to make plaintiff's twenty-fourth proposed finding of fact.

XXV.

The court erred in refusing to make plaintiff's twenty-fifth proposed finding of fact.

XXVI.

The court erred in refusing to make plaintiff's twenty-sixth proposed finding of fact.

XXVII.

The court erred in refusing to make plaintiff's twenty-seventh proposed finding of fact.

XXVIII.

The court erred in refusing to make plaintiff's twenty-eighth proposed finding of fact.

XXIX.

The court erred in refusing to make plaintiff's twenty-ninth proposed finding of fact.

XXX.

The court erred in refusing to make plaintiff's thirtieth proposed finding of fact.

XXXI.

The court erred in refusing to make plaintiff's thirty-first proposed finding of fact.

XXXII.

The court erred in refusing to make plaintiff's thirty-second proposed finding of fact.

XXXIII.

The court erred in refusing to make plaintiff's thirty-third proposed finding of fact.

XXXIV.

The court erred in refusing to make plaintiff's thirty-fourth proposed finding of fact.

XXXV.

The court erred in refusing to make plaintiff's thirty-fifth proposed finding of fact.

XXXVI.

The court erred in refusing to make plaintiff's

thirty-sixth proposed finding of fact.

XXXVII.

The court erred in refusing to make plaintiff's thirty-seventh proposed finding of fact.

XXXVIII.

The court erred in refusing to make plaintiff's thirty-eighth proposed finding of fact.

XXXIX.

The court erred in refusing to make plaintiff's thirty-ninth proposed finding of fact.

XL.

The court erred in refusing to make plaintiff's first proposed conclusion of law.

XLI.

The court erred in refusing to make plaintiff's second proposed conclusion of law.

XLII.

The court erred in refusing to make plaintiff's third proposed conclusion of law.

XLIII.

The court erred in refusing to make plaintiff's fourth proposed conclusion of law.

XLIV.

The court erred in refusing to make plaintiff's fifth proposed conclusion of law.

XLV.

The court erred in refusing to make plaintiff's sixth proposed conclusion of law.

XLVI.

The court erred in overruling plaintiff's objection to defendants' proposed finding of fact and in making said finding of fact.

XLVII.

The court erred in making its first conclusion of law.

XLVIII.

The court erred in making its second conclusion of law.

XLIX.

The court erred in making its third conclusion of law.

L.

The court erred in rendering judgment in favor of the defendants, dismissing this action with costs.

POINTS AND ARGUMENT.

I.

The court should have made the IV, IX, XIV, XIX, XXIV and XXIX proposed findings. Each of these findings relates to one of the six checks and requests the court to find that the payments represented thereby were not applied upon the crushed rock account, but on the account for sand and gravel.

As already stated in our statement of the case, the defendants' answer negatives the idea of payment and proceeds on the theory that although the payments were in fact applied upon the sand and gravel account, they should in equity be applied upon the account for crushed rock; and, as already stated, defendants' own findings of fact and conclusions of law proceed upon this theory. No amendment of the answer was made or even applied for, and the case was at no time tried upon the theory that these payments had in fact been made upon the crushed rock account. It was, therefore, the plain duty of the court to make the findings requested. In its opinion the court declined to pass on this question. See 215 Fed. 628. Moreover, the evidence is undisputed that the payments were all applied upon the sand and gravel

account with the consent of Rector and Daly. Transcript, pp. 37, 47-48, 59-60, 61, 62, 68, 73, 77.

II.

We therefore come to the broad question whether, despite such application, the court should apply these payments upon the crushed rock account. The general rules of law relating to the application of payments are well settled. The debtor may in the first instance direct such application, but in case he does not do so, the application thereof may be made by the creditor. If the creditor refuses to receive the money except upon a certain account and the debtor consents, then he has in law made the application upon such account. The general rule is that third persons have no right to control the application of payments.

30 Cyc. 1250 and cases cited.

Union Trust Co. vs. Casserly, 86 N. W. 545-546.

III.

We now come to the facts upon which defendants rest their claim, that these payments should be applied upon the crushed rock account. The evidence tends to show that Rector and Daly gave the

bank a written assignment of the moneys coming to them from the City of Vancouver under their contract for the improvement of East B Street. Transcript, pp. 167 to 169.

The most that can be claimed with regard to the moneys out of which these checks were paid is that they were moneys placed to the credit of Rector and Daly by the bank by discounting their notes. An attempt was further made to show that in each particular instance the particular note was discounted against the moneys coming to Rector and Daly under their contract. But we shall later in the brief claim that no competent evidence to this effect can be found in the record; and that our motion to strike out the evidence on this point, after it had been developed that such evidence was hearsay, should have been granted. But for the present let us take the view of the facts most favorable to defendants. These show that they had no title whatever to the moneys with which the payments were made. They were the moneys of Rector and Daly loaned to them by the bank. They were not at the time these payments were made moneys which had already been received from the city by Rector and Daly under their contract. The most that can be said is that at the time the bank

loaned them these moneys, the receipt of the money by Rector and Daly from the city was in an advanced state of contemplation.

IV.

Our first contention is that a surety has no right to disturb a lawful application of payment made by the parties, no matter what his equities may be. The authorities seem to divide on this question, but we claim an analysis of the case will show that there is very little authority against us. As supporting the broad proposition of law, we contend for, see

Puget Sound State Bank v. Gallucci, 144 Pac. 698-

People vs. Powers, 66 N. W., 215-216.

See also

Sampson Co. vs. Commonwealth, 94 N. E. 473.

Crane Co. vs. United States F. & G. Co., 132 Pac. 872.

Cain vs. Vogh, 116 N. W. 786.

Turner vs. Yates, 16 Howard 14.

In Mack vs. Alder, 21 Fed. 570, the court said at pages 572-573:

"Here the debtor and creditor are insisting on the appropriation agreed upon between them

from the beginning. No other appropriation was ever made. No representations were made to plaintiffs by the debtor or creditor that any other appropriation had been or would be made. There is no suggestion of actual fraud in the case. It is well settled that the exercise of the right of appropriation belongs exclusively to the debtor and creditor. No third party can be heard for the purpose of compelling a different appropriation from that agreed upon by them. 2 Whart. Cont. p. 926. A surety cannot compel such an application of payments by the creditor as would most relieve him. Id. Judge Story says the 'right of appropriation is one strictly existing between the original parties, and no third party has any authority to insist upon an appropriation of such money in his own favor, where neither the debtor nor the creditor have made or required any such appropriation.' "

In support of this rule of law we invoke the familiar principle that an equity can never be invoked as against a legal right. The application of payments is the exercise of a legal right and gives the creditor a legal right to insist that the application shall stand. In fact, the Supreme Court of

Massachusetts in Lime Rock Bank vs. Plimpton, 17 Pickering, 159-161, held in a very similar case that the mere right to make the application by exercising a right of setoff was a legal right under circumstances very similar, in point of principle, to those in the case at bar.

It would be a very unwise rule to make the mere fact that the creditor knows that the moneys have been derived from a particular source create a legal duty on his part to apply them in such a way as to exonerate the surety from liability. In the complexities of business affairs men do not and cannot segregate the different items of their business transactions and see that moneys received on account of a certain contract are used in extinguishing their obligations incurred by them to third persons in connection with such contract. The retailer buys a carload of flour from the wholesaler. A third person guarantees the debt. The retailer sells the carload of flour and with the proceeds pays the wholesaler, who applies it on another account. Why should the wholesaler be under any obligation to apply such money upon the flour account merely because he knows that the money was derived from the sale of the carload of flour by the retailer. He has a right to assume that the retailer is solvent

and will pay his debts. He has placed himself under no contract obligation with the surety. On the contrary, the very purpose of the suretyship is to protect him, the creditor. This is particularly true with regard to bonds like the one involved in the case at bar given to secure material men under public improvement contracts. In the great majority of cases such bonds are signed by surety companies who receive a money consideration for the risk they take. It would be contrary to public policy to require the material man to protect the rights of the surety. The duty of protecting the surety's rights rests upon the surety himself. There are many ways in which he may do this. Shall he be permitted to receive compensation for the risk and yet throw a portion of the burden upon the very party his bond was given to secure?

V.

Thus far we have been proceeding upon the theory that the plaintiff knew that the moneys out of which the six checks were paid were moneys received by Rector and Daly on account of the improvement of East B Street. But the **question of knowledge is wholly out of the case.** No where in their answer do the defendants claim that at the

time the various payments were made the plaintiff knew that the moneys were derived from the improvement of East B Street. The answer alleges the making of an agreement between plaintiff and Rector and Daly that the moneys received from East B Street should be applied upon another account, and that such an agreement was a fraud upon the rights of the sureties. But it is obvious that the mere agreement would of itself amount to nothing. The question in the background would be whether the payments so applied upon the other account were to the knowledge of the plaintiff made with moneys received from East B Street. On this point the answer is entirely silent. No knowledge is alleged and no amendment of the answer in this respect was ever made or asked for.

VI.

The plaintiff by his request that the court make the III and IV conclusions of law again raised the point that knowledge was essential and that no knowledge could be found by the court upon the ground that the answer does not allege that plaintiff had such knowledge. If knowledge is essential, it is clear upon principle and authority that the burden of alleging and proving it was upon the defendants.

Merchants Ins. Co. vs. Herber, 71 N. W. 624.

Grafton vs. Reed, 12 S. E. 767.

No evidence of knowledge was introduced in the case and all the evidence negatives knowledge. Transcript. The court in its opinion held that knowledge had not been proven. See 215 Fed. 628.

VII.

This brings us to the point that under all the authorities knowledge is essential if the surety is to be permitted to disturb a lawful application of payment. In this connection we call the court's attention to the decision in the Supreme Court of Washington, in which the question arose upon demurrer to the answer, and the answer alleged that the moneys applied upon the other account were to the knowledge of the plaintiff the very moneys received by the contractor on account of the public improvement for which the defendants had become securities. See Crane Co. vs. Pac. H. & P. Co., 36 Wash. 95. In the following cases knowledge was held indispensable:

Thacker vs. Pray, 113 Mass. 291, 295.

Harding vs. Tifft, 75 N. Y. 461, 464, 465.

Grafton vs. Reed, 12 S. E. 767, 769.

Tanner vs. Lee, 49 S. E. 592.

Thacker vs. Bullock Lum. Co., 131 S. W. 271.

Inhabitants vs. Bell, 9 Metc. (Mass.) 499, 503.

The cases which appear to hold to the contrary are cases in which an agent had paid over to his principal the very moneys in his hands **belonging to the principal.** In such cases it is obvious that the ignorance of the principal at the time of applying the moneys upon an indebtedness of the agent to the principal is immaterial. The moneys are not the moneys of the agent at all, and he has no right to apply them upon his indebtedness to the principal, and the principal has no right to apply them upon such indebtedness as against the sureties on the bond of the agent, for the obvious reason that the principal in such a case would by so doing divert his own moneys from their lawful application and thus create a liability against the sureties by his unlawful act in applying his own moneys upon the debt of his agent. This is the principle which was involved in the following cases:

Merchants Ins. Co. vs. Herber, 71 N. W. 621.

United States vs. Eckford, 1 Howard (U. S.) 250.

In United States vs. Eckford, 1 Howard, 250, the

court said at pages 261, 262:

"Much less can they by the mere fact of keeping an account current, in which debits and credits are entered, as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply funds in his hands, but pays them over to the government, without any special direction as to their application. Can the treasury officers say, under the circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argu-

ment. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration.

If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. **The money in the hands of the collector is not his money.** Without a violation of his duty, he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall the sureties not be exonerated? The collector has done all that they stipulated he should do. How, then can they be made responsible?''

The cases relating to the rights of sureties upon official bonds, where the officer holds the same office for several successive terms, shed light upon this question. When the officer is a mere custodian of the moneys, then the law applies the moneys received during a particular term upon his liability to account for moneys received during that

particular term. As stated by the court in U. S. vs. Eckford's Executors, 1 Howard 250, the very moneys turned over to the principal by the agent are in fact the moneys of the principal. But when the moneys collected by the officer are his moneys and he is merely bound to account to the public therefor, the rule is entirely different. In such cases, in the absence of knowledge the public officials may apply the moneys paid on account of a previous deficit, although they were received during a later term of office, and although the effect is to render the sureties upon the later bond liable for a deficiency created by such diversion of the moneys. This distinction is clearly pointed out by the court in Board of Com. vs. Citizens Bank, 69 N. W. 912. See also as sustaining the same view:

Lyndon vs. Miller, 36 Vt. 329.

Chapman vs. Commonwealth, 35 Gratt. 721.

Gwynne vs. Burnell, 7 Cl. & F. 572.

Stone vs. Seymour, 15 Wend. 19.

Egramont vs. Benjamin, 125 Mass. 15.

State vs. Hayes, 7 La. Ann. 121.

State vs. Powers, 40 La. Ann. 234.

Cobrain vs. Bell, 9 Metc. 499.

Montpieler vs. Clark, 32 At. 252.

State vs. Smith, 26 Mo. 226.

State vs. Smith, 32 Mo. 524.

Cook vs. State, 13 Ind. 154.

Crane vs. Commonwealth, 84 Va. 282.

Town of Hudson vs. Miles, 71 N. E. 63.

Inhabitants Etc., vs. Miles, 102 Am. St. 370.

These cases are directly in point. The surety on the later official bond has as strong an equity as the defendants in the case at bar to have the moneys received by the officer for the term during which he has become surety applied on account of the officer's liability for moneys collected during that term. And yet the authorities hold that in the absence of knowledge he cannot assert such an equity.

Indeed some of the decisions go further and hold that knowledge is immaterial because the moneys with which the payment is made are the moneys of the officer and he may apply them as he sees fit.

See Boring vs. Williams, 17 Ala., 510, 522 for statement of general rule that third persons cannot control the application of payment. The decision in favor of the sureties in this case, was placed on the ground of knowledge. See page 526.

The decisions in United States vs. January, 7th Cranch, 592, and First Nat. Bank vs. Nat. Surety Co., 130 Fed., 401, merely hold that the equities of the sureties on the bond for the second term of office will be respected **where the parties have made no application of the payments made.** These cases merely modify the rule of law that the law will apply the payment upon the oldest item of the count by declaring that this will not be done in disregard of the equities of the sureties. But the court did not in these cases hold that the mere equity of the surety would be sufficient to disturb an application of payment lawfully made by the parties.

In First Nat. Bank vs. Nat. Surety Co., the court say at page 409:

> "But in the case as bar neither the debtor or the creditor has made any appropriation, and the deposits made were of the money of the debtor, and unaffected by an equitable charge in favor of either set of sureties, or the bank as the debtor. It was therefore quite within the general rule that Connor & Brady should have the right to apply their deposits to any debt due by them to the bank. But they made no appropriation whatever, and the right and duty of regarding the rights of successive

sets of sureties, when the court is called upon to make an appropriation, is conceded in the cases which maintain most strongly the debtor's right to apply his payments without regard to the source of the money or the rights of sureties."

VIII.

We here invoke a familiar rule of law that is decisive of this case. It is one of the oldest principles of the law that money has no earmarks. Based upon this principle is the well settled rule that the owner of money, wrongfully taken from him and by the wrongdoer applied in payment of his own debt, cannot disturb the application of such payment where the person receiving the money had no knowledge of the owner's rights, even though the money is received in payment of an existing debt. This rule is recognized by the Federal Supreme Court and by all the cases.

Holly vs. Missionary Society, 180 U. S., 284.

Stephens vs. Board of Education, 79 N. Y., 183.

Hatch vs. National Bank, 147 N. Y., 184.

State Bank vs. United States, 114 U. S., 401.

Specialty Glass Co. vs. Daley, 52 N. E., 633.

Spaulding vs. Kendrick, 51 N. E., 453.

Goshen Nat. Bank vs. State of N. Y., 141 N. Y., 379.

Case vs. Hammond Packing Co., 79 S. W., 732.

Smith vs. Bank, 78 N. W., 238.

Gale vs. Chase Nat. Bank, 104 Fed., 214.

Merchants L. & T. Co. vs. Lamson, 90 Ill., App., 18.

Holly vs. Domestic & Foreign M. Soc., 92 Fed,, 747.

Perry vs. Overman, 60 S. E., 604.

Fifth Nat. Bank vs. Hyde Park, 101 Ill., 595.

It is well settled that payment by check or draft is within the meaning of this rule, a payment of money. It is merely a modern convenience for transferring the money to another, and the transaction is precisely the same as though the check had been cashed by the drawer thereof and the actual money delivered.

Goshen Nat. Bank vs. State of N. Y., 141 N. Y., 379.

Hatch vs. Natl. Bank, 147 N. Y., 184.

Holly vs. Domestic & Foreign M. Soc., 92 Fed., 747.

Holly vs. Missionary Society, 180 U. S., 284.

Thacker vs. Pray, 113 Mass., 291-295.

If, therefore, the moneys with which these payments were made had been the moneys of these defendants and could be clearly traced into the hands of the plaintiff, the law would say that defendants could not recover such moneys, although applied upon an existing debt. And the authorities recognize the other doctrine which rests upon this same principle, to-wit: That the owner of the money cannot question the application made by the creditor in extinguishment of his claim against the wrongdoer.

Thacker vs. Pray, 113 Mass., 291, 295.

Indeed the court in Lime Rock Bank vs. Plimpton, 17 Pickering, 159, went further and held that the owner of the money could not follow it, although it had not been applied by the creditor to the debt of the wrongdoer at the time such creditor learned the true ownership of the money, but had been merely loaned to him by such wrongdoer under circumstances such that he had the right to so apply it.

Said the court in this case:

> "The only question, therefore, is whether, after notice, the defendants could lawfully detain the money, and we are of opinion that they could. As Parkhurst was indebted to them in a sum exceeding the loan, they had a legal right of set-off as against Parkhurst, of which they could not be deprived by the intervention of the plaintiffs' claim. * * *. The defendants, therefore, had a legal right to appropriate the money lent, to the payment of their own debt."

But the case at bar is not so favorable to the defendants. They never for a moment owned a dollar of the money with which the payments were made. They did not even have an equitable title thereto. The moneys were the moneys of Rector and Daly obtained by them by putting up their own notes to the bank. The authorities cited demonstrate that they could not question the application of these payments, even if the money had been theirs and had been wrongfully taken from them by Rector and Daly, there being no knowledge alleged, proven or found in the case.

It would be a serious doctrine for the business world to hold that perhaps after the lapse of years the sureties, on discovering the fact, could insist that

an innocent application of the moneys by the creditor to another debt should be disturbed.

See

Harding vs. Tifft, 75 N. Y., 461, 465.

Tanner vs. Lee, 49 S. E., 592.

In this last case it appeared that the wife had given her husband money to apply on her note. But the payment was applied upon the husband's note, the creditor not knowing the source from which the money came. The court held that the wife could not question the application of the payment.

> "Besides, the payment may have lulled the creditor into nonaction. Relying thereon, he may have lost the opportunity to collect by means which were not resorted to because he thought the debt had been fully or partially paid. These considerations, along with the credit on the existing debt, furnish a sufficient consideration to support the transfer of title, and enable the creditor without notice of her claim to retain the same against the defendant."

IX.

Plaintiff's application of the payments made cannot be disturbed on account of suspicion. In

such cases the doctrine of constructive notice does not apply. The rule with regard to negotiable paper is not only that an existing debt is sufficient to make the purchaser of the paper a bona fide holder, but that nothing short of actual notice or fraud can affect his title. This rule of law applies with much greater force to money, and the authorities hold that the third party who has innocently received the money cannot be disturbed in his legal position by mere proof that there were facts sufficient to put a prudent man on inquiry that the money received was not the money of the person paying it. And certainly this must be the rule in those cases in which the facts would be sufficient to put a prudent man on inquiry as to whether the third person did not have a mere equity in having the money used for a certain purpose.

First Nat. Bank vs. Gilbert, 49 Southern 593.
Merchants L. & T. Co. vs. Lamson, 90 Ill.,
App., 18, and cases cited.

We cite the following authorities, which are a few of the many that sustain the doctrine that the title of a person to whom negotiable paper transferred will not be destroyed by proof that he had knowledge of facts sufficient to put a prudent man on inquiry, but that only actual knowledge or fraud

on his part will defeat his title.

Goodman vs. Simonds, 20 How., 343.

Hotchkiss vs. National Shoe & Bank, 21 Wall., 354.

Swift vs. Smith, 102 U. S., 442.

Cromwell vs. Sac. County, 96 U. S., 51.

7 Cyc. 944, and cases cited.

Under this rule the purchaser of negotiable paper from a thief secures a good title unless knowledge or fraud on the part of the purchaser is established. And this title is equally good if he takes the note in payment of an existing indebtedness.

Swift vs. Lyson, 16 Pet. 1.

X.

These rules, both of which are recognized by the United States Supreme Court, apply with still greater force to money. The question is one of general law and not of statutory construction. The Supreme Court of Washington treated it as such in Crane vs. Pacific Heat & Power Co., 36 Wash., 95.

There is nothing in the language of the statute or indeed in the bond itself in any manner creating any obligation on the part of the person furnishing

materials to the contractor to respect the so-called equity of the surety. Any obligation of this kind must be deduced from principles of equity jurisprudence.

XI.

The United States Supreme Court has repeatedly held that in cases where a question of general jurisprudence is involved, the federal courts will not be governed by the decisions of the state courts on the same point.

Swift vs. Lyson, 16 Pet., 1.

Liverpool S. Co. vs. Phoenix Ins. Co., 129 U. S., 397-443.

N. P. Ry. Co. vs. Peterson, 162 U. S., 346.

Bentler vs. Grand Trunk & C. Co., 224 U. S., 85.

XII.

However, as before stated, the decision by the Washington Supreme Court does not touch this case, because all the court decided in that case was that the payment must be applied upon the contract, when it appears that the creditor knew that he was being paid with the very money which the con-

tractor received from the city.

XIII.

The doctrine contended for in this case is an unwarranted extension of the trust fund doctrine. That doctrine permits a person to follow his property so long as he can trace it in substance, although the form may be changed. First of all we contend that this doctrine never has been and never can be applied to the case of payment of money upon a debt. As already shown by the authorities, the owner of the very money paid cannot follow it in the hands of the creditor upon whose debt it has been paid. If then the owner of the legal title to the identical money that was paid cannot follow it, much less can one follow it who is merely invoking the doctrine that, while he did not have the legal title to the money paid, it was in substance his money.

The authorities are unanimous in recognizing the rule that the trust fund doctrine can have no application when it relates to money which has been received in payment of an existing debt without actual knowledge of the equity of the third person.

Burnett vs. Gustafson, 54 Ia., 86.

Stephens vs. Bd. of Education, 79 N. Y., 183.

Charlotte Iron Wks. vs. Woolfs Cloth. Co.,

156 Ill., App., 377, 380.

Pom. Eq. Juris. (3rd Ed.) S. 1048,

where this rule is very clearly stated.

But the case is not even as favorable as this to the defendants. They never for a moment had any title, legal or equitable, to the money with which Rector and Daly paid the plaintiff. Rector and Daly were not even guilty of any fraud upon the sureties in using the money derived from East B Street, (assuming that it was so derived) for the purpose of paying other indebtedness owing the plaintiff. This is a thing that is done every day in the ordinary course of business. As a practical matter it never operates to the detriment of the surety, except in the event of the insolvency of the contractor. The so-called equity of the defendants was at most an anticipation, which they may have entertained as business men, that the proceeds of the contract would take care of the obligations for which they had become sureties. If they were afraid that these anticipations might be defeated, they could have taken security or have obtained some control over the moneys to be derived from the contract, so that they would be sure that such money was used to

extinguish the obligations for which they had become sureties.

The decision in United States vs. American B. & T. Co., 91 Fed., 921, and in the Circuit Court of Appeals at 925, can be distinguished from the case at bar on a number of grounds. In the Circuit Court, the court placed the decision upon the ground of estoppel and upon the ground that the persons furnishing the materials had discharged the sureties by extending the time of payment beyond the time when the public improvement contract was completed and all the moneys thereunder paid. The court said:

> "Looking to the opportunity for protecting himself which the surety has if the debt for materials is due when the final payment is made by the government, it seems but reasonable that, if the material man designedly extends the payment beyond that time, he should be held to have released the surety, and to have elected to look solely to the debtor."

In the Circuit Court of Appeals, the court referred to the fact that the surety had been induced to sign the bond by representation of the plaintiffs in error that the contractors owed no debts, when as a matter of fact, the contractors at the very time

owed the plaintiffs in error a considerable sum of money, and in this connection the court used the following language:

> "Defendant in error was actually led into this particular transaction by the acts of the plaintiffs in error, and surely no court will hear them contend that the surety executing the bond has not complied with its terms and conditions, when they have actually received the money payable under the contract, and applied it, not in accordance with the terms of the contract under which they sold their goods to the contractor, but applied it to another and different debt due themselves, and which would have been worthless but for the misapplication of the payments thus made to them."

XIV.

The defendants have wholly failed to trace the money within the scope of the trust fund doctrine. Taking their own theory of the evidence it establishes simply these facts: Rector and Daly, in the course of the performance of their contract, would need credit, not only for the purposes of this contract but for their general business as contractors. To give them this credit the bank obtained from

them the assignment of the moneys and bonds to be received by them under the contract as collateral security for future advances. From time to time Rector and Daly were credited with the proceeds of notes which they gave to the bank. Whether they were all given under this arrangement will be discussed later. It was out of the proceeds of some of these notes that it is claimed the payments in question were made. But it is obvious that at the time these payments were made no money had yet been received from the city under their contract.

What had occurred was that Rector and Daly in anticipation of receiving money under the contract in the future had borrowed money of the bank, and with this money paid the plaintiff. A simple test will determine whether the money so paid was money derived from the contract. Suppose Rector and Daly had paid these notes from other funds, or suppose that the bank had released its security and taken a real estate mortgage to pay these notes and had collected them by foreclosure of such mortgage, could it claim that in such case the moneys had been derived from the contract? This test shows that the essence of the transaction was this: Rector and Daly had borrowed money on their notes upon collateral. What that collateral was is wholly im-

material. The loan was to them and did not represent a dollar of money which they had received from the city.

We cite the following cases in support of our contention that the facts do not bring the case within the trust fund doctrine at all, even assuming it could apply to a case where the creditor, without knowledge, had received money in payment of his debt.

First National Bank vs. Littlefield, 226 U. S., 110.

In re Brown 193, Fed. 24.

Empire State Surety Co. vs. Carroll County, 194 Fed., 593.

Schuyler vs. Littlefield, 34 Sup. Ct. Rep., 466.

Crawford County Coms. vs. Strawn, 157 Fed., 49.

Lowe vs. Jones, 78 N. E., 402.

Nixon State Bank vs. First Nat. Bk., 60 So., 868.

Red Bud Realty Co. vs. South, 131 S. W., 340.

Bettendorf & Co. vs Mass. & Co., 187 Fed. 590.

In re T. A. McIntyre Co., 185 Fed., 96.

Jaffe vs. Weld, 139 N. Y., Supp., 1101.

In re Lee, 209 Fed, 172.

XV.

To understand this transaction it is necessary to look at the practical business situation. Rector and Daly would need money from time to time in carrying out their contract. But they were to be paid not in money but in bonds of the city. This made it necessary for them to make some kind of financial arrangement under which they could secure temporary loans until they could realize upon the bonds. Such an arrangement was made with the bank. To secure the bank, Rector and Daly assigned to it all moneys coming to them under their contract with the city. The value of this collateral from time to time would depend upon how much had been earned under this contract. Therefore, the bank, before making loans to any extent, naturally required that estimates from the city, showing what had been earned by Rector and Daly, should be produced. This is all the witness, Evans, means when he says these loans were made against such estimates. In fact, he says so in so many words. His testimony is:

"The security of these notes I have testified about was the assignment that was put on

record in the clerk's office, and that is the only way I know." Transcript, p. 119.

Indeed it would be absurd to hold that the bank was trying to get any additional security upon the moneys to be derived from the contract, when the bank already held the absolute right to receive all such moneys under the assignment previously made to it as collateral. When these moneys were loaned to Rector and Daly by the bank they were not then moneys derived by Rector and Daly from the city. The evidence is undisputed that the only moneys which the bank ever received from East "B" Street and placed to the credit of Rector and Daly were the moneys derived from the warrant issued by the city and representing cash paid to it by the property holders along the line of improvement and the bonds aggregating $11,500 par value, as shown by the three receipts, Defendants Exhibits Nos. 10, 11 and 12.

The witness Evans testified on this subject as follows:

> "The company received no further money from East 'B' Street except these bonds and that warrant." Transcript, 109.

The warrant issued was for $10,046.17. Turning to Plaintiff's Exhibit "C" we find under date of

September 11th that this warrant was cashed and the proceeds placed to the credit of Rector and Daly, along with another item for $1000. The debit entry on the same date shows that all of this cash and more than $7000 more was checked out by Rector and Daly by checks aggregating $18,626.04. Transcript, pp. 157 and 158. It is therefore, clear that none of this cash was ever used by the bank to pay any of these notes given by Rector and Daly to the bank. Nor is there any evidence that any part of the proceeds of the bonds for $11,500 were ever applied upon these notes. Rector and Daly did not sell the bonds to the bank; but the bank sold them to Carnstens & Earle, of Seattle for 87 cents instead of par; and the proceeds were placed to the credit of Rector and Daly by the bank and used for taking up their notes. Transcript, pp. 108-109. But it appears in the case that Rector and Daly, during this time, discounted at the bank not merely these six notes, aggregating less than $10,000, but sixteen notes aggregating over $25,000. Transcript, p. 118.

There is no evidence to show when these bonds were sold or when the proceeds were received or on which of these sixteen notes they were applied. So far as the evidence goes there is nothing to show that a dollar of the money that was received from

these bonds was ever applied on any of the six notes in question. The only possible way in which the money could be traced as money coming from the city would be on the ground that the money derived from these bonds had in fact been applied in extinguishment of the notes, the discount of which made the credits against which Rector and Daly checked in making these six payments. And in this connection we cite the familiar rule relating to the trust fund doctrine, that the moneys must be clearly traced. See authorities already cited.

The following facts show that none of the seven checks offered in evidence should be applied on plaintiff's claim, for the balance due for crushed rock.

The check for $649.25 (Ex. 3) has been credited by plaintiff on the claim in the complaint. It, with a discount of 2 per cent, was received by plaintiff in payment of the rock delivered on June 25, 1911. Transcript, pp. 5, 30, 57, 64, 166, 184, and it is for only the balance, after applying this payment, that this action is brought.

The check for $501.64, (Ex. 7) was applied on the account for purchases made prior to July 1st, 1911, and all of plaintiff's claim for rock is for rock sold after July 1st. This check is dated June 23, 1911,

and was credited to the amount against Rector and Daly on that day. Transcript, pp. 47, 48, 63, 115, 116, 167, 181. This paid for rock used on Fourth Plain Street, pp. 47-48. Moreover the attempt to trace the money coming from B Street into this check utterly fails for the reason that the note for $5770, given at the time this check was given was not the only item of deposit that day. It appears there was another item of $1115.75, and that it is impossible to tell from which of these two items this check was paid. Transcript, pp. 115-116.

The check for $1017.49, (Ex. 5) was also applied on the old account before July 1st, 1911. It was given the later part of June, 1911, and was postdated, as was sometimes done. Transcript, pp. 63, 65, 47, 181, 166. Moreover this check was not paid out of the proceeds of the note on $2300, but was paid by the bank out of its own money. The payment of this check created an overdraft, and thereafter Rector and Daly covered this overdraft by giving the note for $2300. Transcript, pp. 110 to 112.

The check for $859.90, (Ex. 4) was paid out of the bank's money. The note for $2079.40 that was given in connection with it did not pay the overdraft existing at that time. He was then overdrawn $2565.43 and after this note was given he was still

overdrawn. Transcript, p. 115.

Moreover the items that were taken into account by the bank in discounting this note for $2079.40 related to estimates on Fourth, Plain and Connecticut Streets as well as on B Street. The estimate on B Street was only for $574.20. Transcript, p. 115. Besides this check was given to pay up the old account to July 1st, 1911. Transcript, pp. 57, 58, 67, 68.

The check for $3,000, (Ex. 6) even if paid out of the proceeds of the note for $4000, does not represent a payment of B Street funds. The note shows on its face that as late as July 30, 1912, there was still $2129.60 due on it. Transcript, p. 172. It is significant that the court records do not show that this note was given on account of B Street. Transcript, p. 114.

The check for $1216.25 (Ex. 1) was given in connection with a note for $1306, and this note was secured by a draft drawn at the same time, but which was never paid. Transcript, pp. 113-114. Even after this note was given the account of Rector and Daly did not have a sufficient balance to take care of this check. Transcript, pp. 113-114. It is undisputed that this check was applied on the sand and gravel account. Transcript, pp. 37, 38, 59, 60.

The check for $1000 was not applied on the crushed rock. Transcript, pp. 69 to 71, 98 to 100, 74 to 76, 127, 128, 133.

And in connection with this check we must keep in mind the fact that defendants do not allege payment, but an equity that certain payments which were applied upon another account should be applied upon the crushed rock.

XVI.

There is still another reason why the contention of the defendants cannot be sustained. They claim that they have an equity in having the moneys paid to the contractors by the city applied upon the debt for materials furnished the contractors in the carrying out of the contract. This assumes that money was to be paid to the contractors; but as a matter of fact, the contractors were not entitled to a dollar of money from the city on their contract. They agreed to accept bonds in pay. The language of the contract is; "And said parties of the first part herein agree to receive and accept said local improvement bonds for all sums of money which they are to receive from said party of the second part under this contract." Transcript, pp. 12-13.

Plaintiff was not bound to take any of these bonds in payment of his claim. It sold the crushed

rock for money and it had the right to demand money in payment therefore. Plaintiff was not bound to ascertain whether its payments came from the proceeds of such bonds, and as a matter of fact they did not. It would be under no obligation to assume that any of these payments were out of money realized from the sale of these bonds; or make any investigation to determine which of the two accounts it should apply the moneys on.

XVII.

The opinion of the court shows that the court found that plaintiff had no knowledge of the source from which the moneys came, and decided the case on the ground that knowledge was wholly immaterial. The court did not even regard as material the question whether plaintiff had constructive notice. It is true that the court refers to this point in the opinion, but no finding on the subject was made. We call attention to the following portions of the opinion to substantiate our claim in this respect:

> "The controlling questions of law to be applied to these facts are: If the money paid the plaintiff was realized from the work secured under the contract, will it be applied in pay-

ment for the crushed rock furnished Rector and Daly by plaintiff; and whether it is necessary to show that the plaintiff knew it was realized from such source before such application will be made." 215 Fed. 625-626.

"While not entirely satisfied upon the question of whether there was an actual appropriation by plaintiff of the checks in payment of what plaintiff refers to as 'sand and gravel account,' in view of the conclusion reached, a finding upon the question is deemed not necessary."

"Knowing these things would, doubtless, constitute reasonable grounds for belief upon his part that such payments were from that source, and was enough to put him upon inquiry as to the source from which they were derived; but they are not enough to warrant a finding of actual knowledge on the part of Captain Hackett, in the face of the positive testimony of himself and Rector." 215 Fed., 628.

"The plaintiff in this case does not occupy the position of an innocent purchaser. The want of knowledge may strengthen an existing equity, but it does not create an equity." See 215 Fed., 630.

These extracts from the opinion make it obvious

that the court did not pass upon the question whether the parties had made an application of the moneys to the sand and gravel account. In view of the allegations in the answer to the proceedings on trial, it is clear that the very basis of the defendants' defense was that the parties had applied the payments upon the wrong account.

XVIII.

The findings of the court do not justify the judgment. There is no finding that the plaintiff had knowledge that the moneys paid to it and applied on the sand and gravel account were in any manner derived from the contract relating to the improvement of East B Street.

It is well settled that where the court in an action at law in the Federal Court assumes to make findings, the findings of fact must sustain the conclusions of law and the judgment.

Sections 649 and 700, R. S., U. S.

Saltonstall vs. Butwell, 150 U. S., 417.

Stone vs. United States, 164 U. S., 380.

Lehner vs. Dickson, 148 U. S., 71.

British Queen Mining Co. vs. Baker Silver Mining Co., 139 U. S., 223.

Webb vs. National Bank, 146 U. S., 717.

Hooven & Co. vs. John Featherstone, 111 Fed. 81.

Guaranty Trust Co. vs. Koehler, 195 Fed. 669.

Chicago & R. Co. vs. Barrett, 190 Fed., 18.

Hayden vs. Ogden Savings Bank, 158 Fed. 90.

Upon the face of the findings the conclusions of law that defendants are entitled to judgment are unwarranted. Such conclusions of law must be deduced exclusively from the findings made and not from the evidence, and therefore the court cannot assume any general finding in support of the judgment. The language of the findings in this respect is: "From the foregoing findings of fact the court concludes:" Then follows the three conclusions of law in favor of the defendants.

XIX.

Even if the doctrine of constructive notice applied to this case, yet the judgment cannot be sustained, as the court nowhere finds that plaintiff at the time of receiving the payments had constructive notice or had knowledge of facts sufficient to put it upon inquiry.

XX.

Moreover, there is no sufficient evidence in the case to warrant a finding of constructive notice.

XXI.

The only evidence tending to show that the moneys with which these payments were made had any connection with the East B Street improvement was the testimony of Milton Evans, the assistant cashier of the bank. His cross examination developed the fact that with respect to some of the facts tending to show that the moneys out of which the checks were paid were advanced on account of the East B Street contract, were facts not known to him personally, and thereupon a motion was promptly made to strike out all of his evidence in this respect. Transcript, pp. 116, 117, 118, 120.

The denial of this motion is assigned as error. Transcript, p. 199.

It should have been granted for the reason that some of the evidence was admitted by Evans to be hearsay, and he not being in position to separate from such hearsay the facts which he knew of his own knowledge, no one knows which of those facts were within his personal knowledge. This point was also raised before the final decision of the court by the XXXIV, XXXV, XXXVI,

XXXVII, XXXVIII, XXXIX findings proposed by plaintiff. Each one of these proposed findings refers to one of the six checks, and in substance requests the court to find that there is no competent evidence to show that that check was paid out of money received by Rector and Daly from or on account of said street improvement B, or in any manner derived therefrom or having any connection therewith. These requests were refused, and to each refusal an exception was allowed. Transcript, pp. 194, 195, 184, 185. See also assignments of error, 39 to 44, both inclusive. Transcript, p. 203.

XXII.

The objection to the jurisdiction of the court on the ground that there was not the necessary diversity of citizenship to give the Federal Court jurisdiction is so ably discussed in the opinion of the court itself that all that will be required is a mere statement of the facts and the law. There was the necessary diversity of citizenship unless one of the defendants was a citizen of the State of Oregon at the time the action was commenced. It is claimed that it does not appear that Rector and Daly were citizens of a state other than Oregon. But this would not be fatal to the jurisdiction of the court.

They were not indispensable defendants. The bond sued upon was the joint and several bond of Rector and Daly and their sureties. Transcript, p. 13.

Under the statute of the State of Washington, the plaintiff could proceed against the sureties alone.

1 Rem. & Bal. Ann. Codes (Wash.), Sec. 192.

See also Pac. Bridge Co. vs. Fid. Co., 33 Wash., 47.

9 Cyc. 709.

Under the conformity statute of the United States it has been held that a state statute determining who are and who are not indispensable parties is controlling in the Federal Courts.

Sawin vs. Kinney, 93 U. S., 290.

See also Atlantic & P. L. vs. Land, 164 U. S., 400.

The rule in the Federal Courts is that the naming of a defendant who is not an indispensable party will not defeat the jurisdiction of the court. In such cases the court may, for the purpose of retaining jurisdiction, dismiss the action as against such party. Rector and Daly were never served with process and never appeared in the action, and when

the question of jurisdiction was raised, the plaintiff, to save any doubt on the point, made a motion to dismiss the action as to Rector and Daly, and this motion was granted. Transcript, pp. 22-23.

On the proposition that the court will allow the plaintiff to dismiss with respect to persons who are not indispensable defendants, in order to obviate the objection to the court's jurisdiction, see:

Beebe vs. Louisville & Co., 39 Fed, 481-484.

Morse vs. South, 80 Fed., 206-207.

Hicklin vs. Masco, 56 Fed., 549.

Claiborne vs. Weddell, 50 Fed., 368.

Smith vs. Consumers C. O. Co., 86 Fed., 359.

Oxley Stave Co. vs. Cooper & Union, 72 Fed., 695.

Sioux City T. R. & W. Co. vs. Trust Co., 82 Fed., 124.

Grove vs. Grove, 93 Fed., 865.

Mason vs. Dullagham, 82 Fed., 689.

Bane vs. Keefer, 66 Fed., 610.

Tug River C. & S. Co. vs. Brigel, 86 Fed., 818.

Horn vs. Lockhart, 17 Wall. 570.

See for a case peculiarly in point:

Smith vs. Consumers C. O. Co., 86 Fed. 359.

But the record does sufficiently show that Rector and Daly were citizens of the State of Washington at the time commencement of the action. It is well settled that the decisive test is at the time the action is commenced.

Koenigsberger vs. Richmond S. M. Co., 158 U. S., 41.

Metcalf vs. Watertown, 128 U. S., 586.

When the point is not made until after the case is tried, the court will explore the whole record to find if it discloses evidence of the requisite diversity of citizenship.

Juneau vs. Brooks, 109 Fed., 353.

Railway Co. vs. Ramsey, 22 Wall., 322.

Steamship Co. vs. Tugman, 106 U. S., 122.

Robertson vs. Cease, 97 U. S., 646.

The contract between Rector and Daly and the City of Vancouver attached to the complaint and admitted by the answer, contains the following recital: "Rector and Daly, both of the City of Vancouver, County of Clarke, State of Washington." The bond sued upon contains the following recital:

"Rector and Daly, of Vancouver, Washington." These recitals are admitted to be true and certainly warrant a conclusion of citizenship at the time the contract and bond were executed. Transcript, pp. 8-13.

It is a familiar rule of evidence that a fact once shown to exist is presumed to continue to exist until the contrary is proven, and this rule has been applied in the case of citizenship. The law presumes that the citizenship of Rector and Daly in the State of Washington continued until the time of the commencement of the action.

Inhab. of Chicago vs. Inhab. of Whatley, 6 Allen, 508.

Daniels vs. Hamilton, 52 Ala., 105.

Prather vs. Palmer, 4 Ark., 456.

Rixford vs. Miller, 49 Vt., 319.

State vs. Jackson, 65 Vt., 657.

9 Cyc. Evidence, 914.

XXIII.

The questions argued are properly before the court. A trial by jury was waived by written stipulation, signed by the parties and filed by the clerk

before the trial. This brings the case within Sec. 649 and 700, R. S. U. S. Under these sections the court may review any error committed upon the trial. This includes findings of fact, which are wholly unsustained by the evidence; refusal to find necessary facts which are supported by the undisputed evidence; refusals to make the rulings upon legal points requested by the plaintiff and all errors in the rejection or admission of evidence. It also raises the question whether the special findings are sufficient to support the judgment. Whether they are sufficient, depends upon the findings themselves, and they cannot be helped out by any reference to the opinion of the court.

Stone vs. U. S., 164 U. S., 380.

Saltonstall vs. Butwell, 150 U. S., 417.

Dickinson vs. Bank, 16 Wallace, 250.

York vs. Washburn, 129 Fed., 564, 566.

Hayden vs. Ogden Sav. Bank, 158 Fed., 90.

XXIV.

But the opinion may be examined for the purpose of determining upon what legal theory the court decided the case.

United States vs. Norfolk & W. R. Co., 114 Fed., 682-686.

Loeb vs. Trustees, Etc., 179 U. S., 472-482-483.

XXV.

Counsel for defendant contended in the court below that the books of plaintiff would show an application of the payments to the sand and gravel account, or at least an application of the moneys to a current account embracing items of sand and gravel and crushed rock. Even if this were so the fact would be wholly immaterial, in view of the undisputed evidence in the case. All the testimony shows that all payments were to be applied upon the sand and gravel until it was fully paid for, and that it was upon such agreement that the material was furnished by plaintiff to Rector and Daly. Transcript, pp. 30, 35, 37, 87, 89, 90-134-135.

In addition to this, defendants' own answer alleges this to be the fact, claiming that such an understanding was a fraud upon the sureties. In their brief in the court below they again made the same contention, saying:

"That there was an understanding between the plaintiff and Rector and Daly that the money which

was received by Rector and paid to the plaintiff, whether it came from this improvement or any other source, should be applied by the plaintiff on the unsecured claim."

These undisputed facts bring the case within an elementary rule of law supported by all the authorities. That rule is this: Where there is an understanding between debtor and creditor that payments are to be applied upon certain items of a current account, the agreement is controlling, and the moneys will be applied in extinguishment of such items, although the books of account kept by the creditor merely show a running account, embracing all items on the one side of the account and crediting all payments on the other side thereof, without any indication of the application of the payments upon the books themselves.

Mack vs. Alder, 22 Fed., 570.

Price vs. Dowdy, 34 Ark., 258, 289.

Smith vs. Vaughan, 78 Ala., 201.

Langdon vs. Bowen, 46 Vt., 512, 515.

Miller vs. Womble, 29 S. E., 102.

30 Cyc., 1245.

XXVI.

This court has power to render final judgment in favor of the plaintiff, and we contend that this is a case where such power should be exercised.

Allen vs. St. Louis Nat. Bank, 120 U. S., 20.

Evans vs. Kister, 92 Fed., 833.

Reed vs. Staff, 52 Fed., 641.

XXVII.

The record properly shows the fact that a jury trial was waived by a written stipulation filed before the trial. Transcript, pp. 21, 22, 27.

Kearney vs. Case, 12 Wall., 275.

Dickinson vs. Planters Bank, 16 Wall., 250.

Bond vs. Dustin, 112 U. S., 604.

The judgment should be reversed and the District Court should be directed to render judgment in favor of plaintiff and against defendants for the amount due, $6189.88, with interest thereon from October 17, 1911, and also all the costs in both courts.

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